No. 21971

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARVEY ALUMINUM (Incorporated),

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

OPENING BRIEF FOR APPELLANTS.

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Statement of Jurisdiction.

Jurisdiction of the District Court for the Central District of California was based upon Section 11(2) of the Labor Management Relations Act of 1947 as amended (73 Stat. 537, 29 U.S.C. § 161) (hereinafter the "Act"), which confers jurisdiction upon the district courts of the United States to issue orders enforcing *subpoenas duces tecum* of the National Labor Relations Board.

The jurisdiction of this Court on appeal to review the Order issued by the Central District Court exists under 28 U.S.C. §1291 and 28 U.S.C. §1294.

Statement of the Case.

This is an appeal to set aside an *ex parte* Order of the Central District Court requiring Appellant Harvey Aluminum (Incorporated) (hereinafter "Harvey Alu-

minum") to comply with the *subpoena duces tecum* issued by the appellee National Labor Relations Board (hereinafter "Board"). On October 20, 1966, the Board filed an application with the District Court for an *ex parte* Order enforcing its *subpoena duces tecum*. The application was heard by the Honorable Thurmond Clarke, Chief United States District Judge, Central District of California, on October 24, 1966. The sole question presented to the Central District Court and the sole question considered by said Court was its jurisdiction to grant *ex parte* enforcement of the *subpoena duces tecum* of the Board [Tr. 1 *et seq.*]. On November 18, 1966, the District Court issued an *ex parte* Order enforcing the Board's *subpoena duces tecum*. The Order was entered by the Board on March 6, 1967, and, thereafter, Harvey Aluminum caused this appeal to be filed.

Statement of Facts.

On April 19, 1965, the United Steelworkers of America, AFL-CIO filed a charge against Harvey Aluminum alleging elimination or reduction of overtime hours and the laying off of employees to discourage union membership in violation of Section 8(a)(1)(3) of the Act [R. 16]. After spending seven months investigating said charge, the Board on November 23, 1965, issued a Complaint [R. 35-43]. Four months later, on March 23, 1966, the Board issued an Amended Complaint against Harvey Aluminum [R. 44-48].

On June 10, 1966, the Board issued a *subpoena duces tecum* to Harvey Aluminum requiring that an extensive number of documents be produced at the hearing before the Trial Examiner [R. 50-51]. On June 20, 1966,

Harvey Aluminum filed a timely petition to revoke the *subpoena duces tecum* [R. 54-57]. Hearing was commenced on July 25, 1966. On September 20, 1966, the Trial Examiner issued a ruling modifying slightly the Board's subpoena [R. 69]. The subpoena, however, was not revoked in its entirety. On October 5, 1966. Harvey Aluminum filed an appropriate application for an interim appeal from said Trial Examiner's ruling [R. 70-72]. The Hearing was adjourned indefinitely on October 10, 1966. On October 17, 1966, the Board issued an order granting said application and on appeal, simultaneously, the Board sustained the Trial Examiner's ruling and refused to revoke the subpoena [R. 89].

On Wednesday, October 19, 1966, Mr. George Pappy of the Board telephoned Mr. Stephen E. Tallent, an attorney for Harvey Aluminum, informing Mr. Tallent that the Board was considering seeking *ex parte* enforcement of the Board's *subpoena duces tecum* by the District Court [R. 160-161]. Mr. Tallent informed Mr. Pappy that the Board could not appropriately proceed in an *ex parte* fashion so as to preclude Harvey Aluminum from receiving a hearing on the merits in connection with the Board's attempt to secure enforcement of its *subpoena duces tecum* [R. 160]. Mr. Pappy offered to permit Harvey Aluminum to have a hearing on the merits if Harvey Aluminum would stipulate not to appeal in the event that the District Court enforced the subpoena [R. 160]. When Mr. Tallent stated that he considered such a stipulation to be inappropriate, Mr. Pappy responded that the Board was under no obligation to give Harvey Aluminum a hearing in a subpoena enforcement action before the District Court and that the Board would proceed *ex parte* re-

gardless of Mr. Tallent's arguments that this procedure was unavailable to the Board [R. 160-161].

In accordance with Rule 3(i) of the Rules of the Central District governing *ex parte* proceedings, Mr. Pappy arranged to have the Honorable Thurmond Clarke, Chief United States District Judge, Central District of California, consider its subpoena enforcement action at an *ex parte* proceeding at 10:00 A.M., Monday, October 24, 1966, and advised Mr. Tallent of this fact by telephone on Thursday, October 20, 1966 [R. 142]. Mr. Pappy mailed a courtesy copy of the Board's application and memorandum in support thereof to William F. Spaulding and Stephen E. Tallent on October 20, 1966 [R. 142].

On Monday morning, October 24, 1966, the Board's subpoena enforcement proceeding came before the Chief Judge Thurmond Clarke for *ex parte* consideration. The Board argued that the District Court could and should issue an *ex parte* Order enforcing the Board's subpoena. The Board through its counsel stated to the District Court:

> "The question is, shall the principal case be delayed even further by what we consider would be an unnecessary hearing on the merits of this proceeding?" [Tr. 7, lines 14-16].

Mr. William F. Spalding, an attorney for Harvey Aluminum, questioned the District Court's jurisdiction to consider the Board's *ex parte* application for subpoena enforcement [Tr. 9, lines 9-16]. Chief Judge Thurmond Clarke then requested memoranda from both the Board and Harvey Aluminum on the question of the propriety of the District Court issuing an *ex parte*

Order enforcing the subpoena of the Board [Tr. 10-12]. The matter was taken under submission and on November 18, 1966, the District Court issued the *ex parte* Order which is the subject of this Appeal. The Order was entered by the Board on March 6, 1967.

Questions Presented.

The questions presented all involve the central issue of whether the District Court can properly grant *ex parte* enforcement to a *subpoena duces tecum* of the Board. This basic issue gives rise to the following questions:

(1) Must the Board give legal otice of its subpoena enforcement proceeding and cause the issuance of process bringing the adverse party within the jurisdiction of the District Court?

(2) Are the Board and the District Court free to ignore the minimum requirements of the Federal Rules of Civil Procedure and of Due Process of Law in a subpoena enforcement proceeding?

(3) Is an order of the District Court valid when issued without any hearing, or opportunity for hearing, on the merits?

ARGUMENT.

On Thursday, October 20, 1966, the Board mailed on attorney for Harvey Aluminum a courtesy copy of certain papers which the Board intended to present to the District Court for both initial consideration and final ruling on the following Monday morning, October 24, 1966. The Board did not serve Harvey Aluminum with a summons or any other conceivably appropriate process of the District Court to give legal notice of the commencement of a subpoena enforcement action or to bring Harvey Aluminum under the jurisdiction of that court.

The Board requested and the District Court issued an *ex parte* Order enforcing the *subpoena duces tecum* without complying with any of the minimum requirements of the Federal Rules of Civil Procedure made applicable to such proceedings by Rule 81(a)(3) of the Federal Rules of Civil Procedure (28 U.S.C.A. Rule 81(a)(3) (hereinafter "Federal Rules"). Rule 81(a)(3) was applicable to the District Court proceeding and while the District Court may truncate the ordinarily applicable Federal Rules when an appropriate request for such an order is made after the proceeding has been appropriately commenced, neither the Board nor the District Court is free to completely ignore the Federal Rules and to proceed on an *ex parte* basis.

Minimum requirements of Due Process of Law require that a party against whom enforcement of a *subpoena duces tecum* is sought be given an opportunity for a hearing on the merits of said enforcement. The *ex parte* procedure adopted by the Board precluded Harvey Aluminum from obtaining a hearing, or opportunity for hearing, on the merits of the Board's subpoena enforcement.

I.

The Board Failed to Provide Harvey Aluminum With Legal Notice of the Subpoena Enforcement Proceeding.

In attempting to set in motion its subpoena enforcement proceeding before the District Court, the Board at no time secured the issuance of a summons, order to show cause, or other process of Court. Rather, counsel for the Board assumed that it could properly secure *ex parte* enforcement of its subponea by the District Court and therefore did not give Harvey Aluminum any legal notice in connection with enforcement.

The only time when the notice requirements of the Federal Rules may be avoided without an order of court is where the matter in question is one which can be heard and ruled on *ex parte*. Rule 12 of the Federal Rules provides for twenty (20) days after the service of the summons and complaint in which to answer or otherwise plead. Rule 6(a) and (d) of the Federal Rules requires that a party moving by way of motion give the opposing party at least five (5) days' notice excluding Saturday and Sunday unless a different period is fixed by order of court. The Board did not file or serve a summons and complaint nor did it elect to proceed by way of order to show cause. No order shortening time was granted by the District Court. Having elected to proceed *ex parte,* no process of any type issued from the District Court and the attorneys for Harvey Aluminum in the unfair labor practice proceedings were made aware of the Board's enforcement action only two days, excluding Saturday and Sunday, prior to the District Court's consideration of the matter.

It is submitted by Harvey Aluminum that neither the Act nor the Federal Rules permit the Board to seek *ex parte* enforcement of the subpoena (discussion Section II *infra*). In the absence of the availability of such an *ex parte* action, the Board failed to provide Harvey Aluminum with any legal notice of the proceeding held on October 24, 1966. The absence of legal notice was brought to the attention of the District Court on October 24, 1966 [Tr. 11, lines 15-21].

II.

Subpoena Enforcement Actions Necessitate Compliance With the Minimum Requirements of the Federal Rules.

In 1946, Rule 81(a)(3) was amended to add the following language:

> "These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings."
>
> Federal Rules, Rule 81(a)(3).

The above quoted portion of Rule 81(a)(3) has continued in effect from its amendment to the present and establishes the applicability of the Federal Rules to subpoena enforcement actions unless otherwise provided by statute, rule of court or order of court. Thus, unless the Board can establish the appropriateness of an *ex parte* proceeding pursuant to Rule 81(a)(3), the Or-

der which is the subject of this Appeal must be vacated and set aside.

Section 11(1) of the Act authorizes the Board to issue *subpoenas duces tecum* during the course of an investigation or proceeding under the Act. The Board is not granted authority to compel enforcement of such *subpoenas duces tecum.* In the event of noncompliance, the only recourse of the Board is to seek enforcement in the appropriate district court. Such enforcement proceedings are provided for by Section 11(2) of the Act which provides as follows:

> "In case of contumacy or refusal to obey a subpena issued to any person, any *district court* of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, *upon application by the Board shall have jurisdiction to issue* to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." (Emphasis added.)
>
> Labor Management Relations Act, 1947, as amended (73 Stat. 537, 29 U.S.C. § 161(2)).

Section 11(2) of the Act is couched in the general language and does not specify any procedure to be

followed in subpoena enforcement actions. There is no language in Section 11(2) which makes the Federal Rules inapplicable to a subpoena enforcement proceeding within the "otherwise provided by statute" language of Rule 81(a)(3)(1). To support its position that Section 11(2) of the Act permits the Board to proceed on an *ex parte* basis, the Board is forced to argue that the words "by application" in that section establishes a specific *ex parte* enforcement procedure within the "otherwise provided" language of Rule 81(a)(3). This argument finds no support in the decisions rendered subsequent to the 1946 amendment of Rule 81(a)(3) (nor for that matter prior to 1946) and is contrary to the approach taken by the Board in other subpoena enforcement actions before the Central District Court of California. In *N.L.R.B. v. British Auto Parts, Inc.* (C.D. Cal. 1967), 266 F. Supp. 368, the Board itself, confirmed the position of Harvey Aluminum concerning the applicability of the Federal Rules to a subpoena enforcement action under Section 11(2) of the Act. There the District Court for the Central District of California reviewed the proceeding before the Court stating:

> "This cause came on to be heard upon a complaint for an order compelling production of records filed by the plaintiff National Labor Relations Board on January 16, 1967, and upon the issuance of a rule to show cause on that date setting the matter for hearing on February 27. On February 10, 1967, defendant filed an answer and on February 20, defendant filed motions to dismiss the said complaint and for summary judgment. The Board filed no response to defendant's mo-

tions; the parties stipulated that the points and authorities filed by the Board in support of the complaint would be deemed its opposition to the said motions and the points and authorities filed by defendant in support of its motions would be deemed its opposition to the complaint."

N.L.R.B. v. British Auto Parts, Inc., 266 Fed. Supp. 368, 370.

If indeed the Board's position is that the words "by application" in Section 11(2) of the Act actually mean "by *ex parte* application", then why has the Board itself failed to follow this *ex parte* procedure in other subpoena enforcement actions pending in the same District Court at almost the same time.

A. Appellate Courts Have Consistently Found Rule 81(a)(3) Applicable in Analogous Subpoena Enforcement Situations.

The courts reviewing the approaches taken by district courts in enforcing subpoenas for administrative agencies operating under the statute analogous to Section 11(2) of the Act have uniformly found the Federal Rules to be applicable. In *United States. v. Powell* (1964), 379 U.S. 48, the Supreme Court considered an administrative subpoena issued under the provisions of 26 U.S.C. §4604(b) and 4702(b) pursuant to which the Internal Revenue Service "may apply to the judge of the District Court" and the "District Court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers or other data." In footnote 18, the Court remarked:

"Because § 7604(a) contains *no provision specifying the procedure to be followed* in invoking the

court's jurisdiction, the Federal Rules of Civil Procedure apply, Martin v. Chandis Securities Co. 128 F2d 731. The proceedings are instituted *by filing a complaint, followed by answer and hearing.*" (Emphasis added).

United States v. Powell, 379 U.S. 48, 58.

This circuit has held the Federal Rules applicable to its subpoena enforcement procedures. In *Martin v. Chandis Securities Co.* (9th Cir. 1942), 128 F. 2d 731, the Court had before it the matter of enforcing a subpoena issued by the Internal Revenue Service. The Code Section granted the district court jurisdiction "by appropriate process to compel" the production of evidence. The Court stated:

"The Internal Revenue Code contains *no provision specifying the procedure to be followed* in invoking the jurisdiction of the court below. We believe, as appellant contends, that the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, are applicable. The pleading denominated a *'Petition' will be treated as a complaint, there being no provision for a 'Petition'.* Under Rule 8(a), it was *necessary for the complaint to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.*" (Emphasis added).

Martin v. Chandis Securities Co., 128 F. 2d 731, 734.

The *Chandis* decision was cited with approval by the Supreme Court in *United States v. Powell, supra.* Just as in *Chandis,* the application of the Board in the in-

stant case could have been treated by the District Court as a complaint and a summons issued.

In *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission* (10th Cir. 1964), 328 F. 2d 285, the court had before it an order of the district court enforcing a subpoena of the Securities and Exchange Commission. The statute provided:

> "In case of contumacy or refusal to obey a subpena issued to any person, any of the said *United States courts,* within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, *upon application* by the Commission *may issue* to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." (Emphasis added).
>
> 15 U.S.C. § 77v(b), p. 152.

The relevant wording of the statute in question is identical to Section 11(2) of the Act. The court reversed the district court's order enforcing the subpoena and in the process noted (328 F. 2d at 288) (apparently approvingly) that the matter had been handled below by application of the Rules of Civil Procedure and, particularly, the Summary Judgment Rule. In that case the Court stated that the Commission's "application" was considered to be its "pleadings" (328 F. 2d at 286).

B. District Courts Ruling on Subpoena Enforcement Have Found Rule 81(a)(3) Applicable.

The district courts giving initial consideration to subpoena enforcement actions in analogous situations have applied Rule 81(a)(3). In *Long Beach Federal Savings and Loan Association v. Federal Home Loan Bank Board* (S.D. Cal. 1960), 189 F. Supp. 589, the court was petitioned to enforce the subpoena of the Federal Home Loan Bank Board under the Housing Act of 1954. The wording of the Housing Act authorizing court enforcement of subpoenas was almost identical with that of Section 11(2) of the National Labor Relations Act. As quoted in the court's decision the Housing Act provided:

> "[A]nd the board or any *interested party may apply* to the United States District Court where such hearing is designated for the enforcement of such subpoena or subpoena duces tecum and *such court shall have power to order* and require compliance therewith." (Emphasis added).
>
> *Long Beach Federal Savings & Loan Assoc. v. Federal Home Loan Bank Board,* 189 F. Supp. 589, 595.

Apart from the case on its merits the court made the following relevant holdings:

> "By F.R.Civ.P. 81(a)(3) the Federal Rules of Federal Procedure apply to proceedings to compel the giving of testimony or the production of documents in accordance with a subpoena issued by an officer or an agency of the United States under any statute of the United States except as 'otherwise provided' by statute or rules of the District

Court, or by an order of the court in the proceedings.

* * * *

"Thus, there is no statute by which the *procedure* for enforcement of administrative subpoenas is 'otherwise provided' than by Federal Rules of Civil Procedure as provided in F.R. Civ.P. 81(a)-(3). There are no rules of this court, or order of this court in this proceeding 'providing otherwise,' and if there were, it is at least doubtful if either would prevail over the statutory command just above quoted."

Long Beach Federal Savings & Loan Assoc. v. Federal Home Loan Bank Board, 189 F. Supp. 589, 595-596.

In *Kennedy v. Rubin* (N. D. Ill., 1966), 254 F. Supp. 190, the court had before it a proceeding to enforce a subpoena issued by the Internal Revenue Service. The statutory provision in question referred to the subpoena as a "summons"; but it was in fact nothing more than a *subpoena duces tecum.* The court stated:

"It is clear, initially, that the statutes at issue, Sections 7402(b) and 7604(a), provide only that the United States District Court for the district in which respondent resides shall have jurisdiction by appropriate process to compel appearance, testimony and/or production. There is no indication that the Federal Rules would not apply to such an enforcement proceeding. In the *absence* of a clear *negative statutory pronouncement,* or compelling circumstances, requiring a contrary order by this Court, it would seem apparent under our reading of Rule 81(a)(3) *that the Federal Rules* gen-

> erally applicable to civil proceedings *must be utilized.* Indeed, this approach has been indicated to be correct by the Supreme Court of the United States in United States v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964). * * *" (Emphasis added).
>
> *Kennedy v. Rubin,* 254 F. Supp. 190, 191-192.

Section 11(2) of the Act contains no such "clear negative statutory pronouncement." The court then went on to reject the petitioner's undue delay argument, a position quite similar to that of the Board below, as follows:

> "At best, petitioner may prevail only upon a strong showing of extraordinary circumstances which might justify suspension of the customarily applicable federal rules. *Petitioner's arguments relating to its need for 'swift summary adjudication' do not meet this burden.* Respondent has raised important defenses to the enforcement action instituted herein. While often the proverbial wheels of justice must grind slowly, it is just such deliberation, resulting from formal procedure, which insures each party in orderly hearing and concordant full protection of the laws. * * *" (Emphasis added).
>
> *Kennedy v. Rubin,* 254 F. Supp. 190, 192.

In all of the decisions involving subpoena enforcement since the adoption of amended Rule 81(a)(3) in 1946 where the relevant statute has been couched in general terms such as "by application" found in Section 11(2) of the Act, the courts have found the Federal

Rules applicable and an opportunity to file responsive pleadings and to obtain a hearing on the merits has been granted. The term "application" as used in Section 11(2) is obviously not a word of art. It does not create any new type of procedure in the Federal District Courts but merely authorizes resort to the court in the general sense. Indeed, the word "application" is a generic term which includes all of the means of seeking court action. To overcome the presumptive application of Rule 81(a)(3), there must be a clear statutory pronouncement establishing the procedural steps which must be followed. Where, as here, reliance must be placed upon a broadly worded statute without any such procedural ramifications, no District or Appellate court other than in the instant case has held that Rule 81(a)-(3) is inapplicable.

The only cases finding an exception to the full use of the Federal Rules through the Rule 81(a)(3) "otherwise provided by statute" provision are *United States v. Associated Merchandising Corporation* (S.D.N.Y. 1966), 256 F. Supp. 318 and *Federal Maritime Com'n v. Transoceanic Terminal Corp.* (E.D. Ill. 1966), 252 F. Supp. 743. Even in these cases, the Federal Rules were observed to the extent necessary to permit a full hearing on the merits. The Federal Rules were truncated but not ignored completely as they were in the instant case.

In *United States v. Associated Merchandising Corporation, supra*, 256 F. Supp. 318, the Court was con-

sidering a subpoena enforcement involving the Federal Trade Commission and the statute in question granted the district court jurisdiction to order compliance by issuing a "writ of mandamus." The court distinguished the Supreme Court's decision in *United States v. Powell, supra,* as follows:

> "The Supreme Court's remark in *Powell* was premised on the fact that the Internal Revenue Code does not specify the procedure to be followed. It says merely that the court shall have jurisdiction 'by appropriate process' to compel production. 15 U.S.C. § 49, on the contrary, does specify the procedure. It confers jurisdiction upon the court to proceed by a writ of mandamus."
>
> *United States v. Associated Merchandising Corp.,* 256 F. Supp. 318, 320-321.

In view of the specific statutory language the court concluded:

> "I cannot believe that Congress contemplated, when it provided for the issuance of mandamus, that respondents would be entitled as a matter of right to such protracted discovery." (p. 321).

In permitting the Federal Trade Commission to proceed by application and order to show cause, the district court did not recite how much of the Federal Rules had been observed but a hearing on the merits of the matter was not foreclosed. Even under the specific statutory language in question the court stated:

> "I will set the government's application down for a hearing in open court on September 9, 1966, at 10:00 A.M. Not later than September 2, respondents shall serve and file their answer to the

application and their affidavits in opposition to it. At the hearing, both sides, if they so desire, may offer testimony in support of their respective contentions on the merits."

United States v. Associated Merchandising Corp., 256 Fed. Supp. 318, 321.

In *Federal Maritime Comm'n v. Transoceanic Terminal Corp., supra,* 252 Fed. Supp. 743, the court relied upon the statutory grant of power to enforce Federal Maritime Commission subpoenas by "writ of injunction", the courts power to modify the Rule 81(a)(3) requirements and the existence of an emergency situation to permit the Commission to proceed by an application and order to show cause. Again the full procedure followed by the court is not clear from the opinion but the right to a trial on the merits was clearly preserved. The statute in question authorized the District Court to enforce obedience where proper "by a writ of injunction or other proper process". After recognizing the applicability of Rule 81(a)(3) the court stated:

"Rule 81(a)(3) does not command that there be a complaint and answer in all civil actions. Were Rule 81 to require the lengthy complaint and answer procedure, the federal courts would be unable effectively to adjudicate emergency injunctive petitions. It is for that reason that Rule 81 contains the two exceptions allowing procedure to be governed by other statutory provisions or by court order in the proceedings. As noted above, both the I.C.C. Act and the Shipping Act provide that subpoena enforcement may be by writ of injunction. Moreover, the court is specifically

permitted to utilize other procedures under Rule 81. * * *"

Federal Maritime Com'n v. Transoceanic Terminal Corp., 252 F. Supp. 743, 746.

Thus, the court relied both upon specific statutory language and its ability under Rule 81(a)(3) to modify the procedural rules applicable to the enforcement proceeding in permitting the Federal Maritime Commission to proceed by a hearing under an order to show cause. Even under this special statutory language, however, the court indicated that the truncation of proceedings was based on a large part upon the showing of the emergency nature of the action.

"Enforcement proceedings for other Commission orders, and possibly in a special case even subpoena enforcement, perhaps should proceed in a different manner. This case, however, with its somewhat emergency nature because of the impending opening of the inland shipping season on the Great Lakes, ought to proceed before the Commission as expeditiously as possible."

Federal Maritime Com'n v. Transoceanic Terminal Corp., 252 F. Supp. 743, 745.

The District Court in the instant proceeding did not meet these minimum requirements; Rule 81(a)(3) was not found to be applicable, no request for a truncated proceeding was made, no hearing on the merits was permitted and the Board made no showing that an emergency situation existed. The absence of such an emergency situation is clearly demonstrated by the history of the Order issued by the District Court. The Order was issued November 18, 1966 and the Board

did not have the Order entered until March 6, 1967 [R. 122-23]. The absence of both specific statutory language indicating the propriety of a truncated proceeding and the absence of an emergency situation demonstrates that the normal Federal Rules of Civil Procedure should have been applied by the District Court. Even the existence of an emergency, however, would not sanction the *ex parte* approach adopted by the District Court.

C. The District Court Did Not Issue an Order Modifying the Application of Rule 81(a)(3).

Harvey Aluminum was informed on or about October 20, 1964, that appellee would appear before Chief Judge Clarke on October 24, 1966, to secure an *ex parte* Order enforcing the Board's *subpoena duces tecum*. When Chief Judge Clarke considered the matter on October 24, 1966, the only question before him and the only question considered by him was whether the Board could proceed by *ex parte* Order in enforcing its *subpoena duces tecum* [Tr. 1 *et seq.*]. Such *ex parte* Order was subsequently issued [R. 122-23]. A reading of the transcript of the proceeding on October 24, 1966 [Tr. 1 *et seq.*] and the memoranda submitted thereafter at the request of Chief Judge Clarke [R. 109-121, 92-107], makes it quite evident the sole question considered by the District Court was whether Rule 81(a)(3) was even presumptively applicable to the enforcement proceedings then being considered. By ordering *ex parte* enforcement, the District Court was not concluding that though Rule 81(a)(3) applied, the District Court would modify the procedure provided for therein. Rather, the District Court by issuing

its *ex parte* Order confirmed the Board's argument that Rule 81(a)(3) was inapplicable to enforcement proceedings brought by the Board under Section 11(2) of the Act. The District Court even ignored the extremely truncated order to show cause alternative posed by the Board at one point [R. 14].

D. The Board Relied Upon Superseded Authority in Seeking Ex Parte Enforcement of Its Subpoena.

In seeking *ex parte* consideration of its subpoena enforcement action in the Central Distrct Court, the Board relied upon three cases decided in the early 1940's [R. 3]. See, *Goodyear Tire & Rubber Co. v. N.L.R.B.* (6th Cir. 1941), 122 F. 2d 450; *Cudahy Packing Co. v. N.L.R.B.* (5th Cir. 1941), 117 F. 2d 692; *Bowles v. Bay of New York Coal & Supply Corp.* (2d Cir. 1945), 152 F. 2d 330. All of these decisions were handed down before the 1946 amendment of Rule 81(a)(3) of the Federal Rules which adopted the position that the enforcement of administrative subpoenas is governed by the Federal Rules. The Board did not cite and could not cite any decisions since the 1946 amendment of Rule 81(a)(3) which supported its *ex parte* argument, since all of those decisions make it clear that the Board's position is erroneous. An examination of the decisions cited by the Board demonstrates that even in these cases evidence was submitted and some type of hearing was held. Moreover, the decision in *Martin v. Chandis Securities Co., supra*, 128 F. 2d 731, demonstrates that the Ninth Circuit even prior to the amendment of Rule 81(2)(3) had adopted the position that the Federal Rules were applicable to the subpoena enforcement actions of administrative agencies.

During the *ex parte* proceeding before the District Court, the Board relied heavily upon the *Goodyear* and *Cudahy* decisions [Tr. 6-7]. In a subsequent hearing before the District Court, counsel for the Board confessed error in relying upon these decisions to support *ex parte* enforcement of the subpoena:

> "Now, we have discovered since the court granted its order that in the Goodyear Tire & Rubber case, and the Cudahy Packing case, which we relied on, which designated this proceeding—that is, a subpoena enforcement proceeding of the National Labor Relations Board — as a summary proceeding, we discussed by searching in the District Court records in those cases that, in fact, those proceedings were commenced by orders to show cause. It doesn't appear in the Opinion of the Circuit Court, but they were commenced by orders to show cause. They are old cases, but we did find records." [Tr. 22, lines 1-12].

The Board has thus established that *ex parte* enforcement of Board subpoenas was not available even before the amendment of Rule 81(a)(3).

III.

Harvey Aluminum Was Entitled to a Full Consideration of Its Arguments and a Hearing on the Merits Before the District Court.

By seeking *ex parte* enforcement of its subpoena, the Board demonstrated that it considered the District Court's function to be ancillary to the Board's own proceeding and thus devoid of any requirement for independent inquiry. District Court proceedings do not merely grow out of Board proceedings. This was recog-

nized by the Ninth Circuit Court of Appeals in *Flotill Products, Inc. v. FTC* (9th Cir. 1960), 278 F. 2d 850, where in connection with an enforcement proceeding under the Federal Trade Commission Act, the court stated:

> "The proceeding in the district court was not ancillary to prior administrative action but formed an *independent cause of action framed by the pleadings therein.* I.C.C. v. Brimson, 1894, 154 U.S. 447, 487, 14 S.Ct. 1125, 38 L.Ed. 1047. * * *" (Emphasis added.)
>
> *Flotill Products, Inc. v. FTC,* 278 F. 2d 850, 852.

The Board's *ex parte* procedure precluded proper action by the District Court. The corollary of the *Flotill* decision is that the subpoena enforcement proceeding now before the District Court is a "case or controversy" in the full meaning of the term. In *Crafts v. FTC* (9th Cir. 1957), 244 F. 2d 882, the court refused enforcement of an administrative subpoena stating:

> "It cannot be too often reiterated that the attempt to enforce an administrative subpoena *initiates a case or controversy.* All questions relating to jurisdiction of the court, authority of the administrative body, reasonableness of the demand under all the circumstances, with regard for due process and protection of individual rights, and relevancy of the testimony and documents demanded are justiciable. ***" (Emphasis added).
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> *Crafts v. FTC,* 244 F. 2d 882, 890, rev'd on other grounds, 355 U.S. 9.

Harvey Aluminum was not provided with the opportunity to question the Board's subpoena in any manner. While arguing the appropriateness of the automatic enforcement of its subpoena through *ex parte* consideration by the District Court, the Board heavily relied upon *N.L.R.B. v. United Aircraft Corp.* (D.C. Conn. 1961), 200 F. Supp. 48 *affirmed* (2d Cir. 1962), 300 F. 2d 442, where the court stated in reference to enforcing a Board subpoena:

> "A proceeding for judicial enforcement of a subpoena *involves more than an automatic issuance of the order* and it has been held by the Supreme Court that such a proceeding is a 'case' or 'controversy'." (Emphasis added).
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> *N.L.R.B. v. United Aircraft Corp.,* 200 F. Supp. 48, 50.

The fact that the District Court's jurisdiction is neither ancillary nor subservient to the related Board proceeding must be the conclusion from the above as well as *Chapman v. Maren Elwood College* (9th Cir. 1955), 225 F. 2d 230. The court there stated most forcefully:

> "The sole ground for the intervention of the federal courts to assist executive or administrative investigations is that the passing of such an order is a judicial act, with all which that phrase implies. The proceeding must have as its basis a 'case' or 'controversy' under the Federal Constitution. The agency asserts its subpoena rights. The college denies. 'Thus has arisen a dispute involving rights or claims asserted by the respective parties to it.'
>
> * * *

"The exercise of the judicial function *implies consideration and adjudication.* The slanders upon administrative investigations might have found some justification were it not that 'the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice'. Cardozo, J., dissenting in Jones v. Securities and Exchange Commission, 298 U.S. 1, 33, 56 S.Ct. 654, 665, 80 L.Ed. 1015. The key question in enforcement of the demand to produce records is whether it is reasonable or arbitrary.

* * *

"The proceeding is equitable in character. Equitable consideration should prevail. There is no power to compel a court to rubberstamp action of an administrative agency simply because the latter demands such action.***" (Emphasis added).

Chapman v. Maren Elwood College, 225 F. 2d 230, 231-234.

Ex parte procedure completely ignores the basic function of requiring the Board to seek enforcement of its subpoenas in the district court rather than having the subpoenas self enforcing. By eliminating the district court's independent inquiry function through *ex parte* enforcement, the statutory structure of the Act the Federal Rules, the case or controversy requirements of the Constitution, and the proper function of Article III courts are ignored.

In *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission, supra,* 328 F. 2d 285, the Tenth Circuit reversed the lower court's enforcement of a subpoena issued by the Securities and Exchange

Commission because the lower court had taken too restrictive a view of its function in making factual determinations as a predicate to the validity of the subpoena requested. The court pointed out:

> "As indicated, the parties submitted the matter on motions for summary judgment, and nothing appears in the record to show the Rules of Civil Procedure were not applied. The affidavit of appellant raised questions of fact bearing on the question whether the request was within the statutory authority of the Commission, and whether it was arbitrary. The Government's position here assumes that these facts cannot ever be material because even if established the court must nevertheless enforce the subpoena. This position is not correct. The facts are material because they are relevant to the question of *whether or not the Commission was acting arbitrarily or in excess of its statutory authority*. The factors were reserved to the courts by the decision in Okl. Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614. * * *" (Emphasis added).
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> *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission,* 328 F. 2d 285, 288.

To similar effect see *N.L.R.B. v. Anchor Rome Mills* (5th Cir. 1952), 197 F. 2d 447.

It is submitted that it is clear both from the Act and the decisions of the courts that the district court is not a clerk for the National Labor Relations Board in the matter of enforcing subpoenas. Judicial enforcement is not a mere ministerial act. There is a case or controversy to be litigated in the judicial sense. The rules of procedure, substantive law and common sense

dictates that the Board like any other litigant must file an adequate pleading and serve it and some type of process, in order for the court to acquire jurisdiction over the defendant and the proceeding. The defendant must be given the time to answer provided by the Federal Rules, and when issue is joined either party is then free (but only then) in accordance with the Rules, to move in any manner appropriate. Until the matter is at issue nothing can appropriately be done or decided. The court may well desire to suspend certain rules; but until issue is joined this cannot be known and *ex parte* enforcement is inappropriate under any circumstances.

The ruling of the District Court in the proceeding now before this Court precluded Harvey Aluminum from obtaining any form of hearing on the merits in the District Court. The Supreme Court in *Reisman v. Caplin* (1964), 375 U.S. 440 in a subpoena action under the Internal Revenue Code held:

> " 'Any enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness. In such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings.' "
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> *Reisman v. Caplin,* 376 U.S. 440, 446.

Accord:

> *Anheuser-Busch, Inc. v. Federal Trade Com'n* (8th Cir. 1966), 359 F. 2d 487.

In *McGarry's, Inc. v. Rose* (1st Cir. 1965), 344 F. 2d 416, the Court of Appeals upheld the district court's

view of the petition and order to show cause in the following language:

> "The record in the instant case shows that appellants were served with orders to show cause and petitions to enforce summonses, each of which fully apprized them of the nature of the relief sought by appellee. In the two-month interval between the issuing of the show cause order and the actual hearing thereon, appellants and their counsel had ample time to evaluate and study the petitions and show cause orders, and to file both short and lengthy motions to dismiss, as well as an answer, all of which put in issue before the district court the contrary positions of the parties on this matter. *A reading of the opinion in United States v. Powell, supra, leaves no doubt that the thrust thereof is to insure that a taxpayer obtain an adversary-type hearing in the district court* prior to his being forced to comply with an administrative summons which he challenges in good faith. That the procedure followed in the instant case fully complies with the essential requirements of the Powell decision appears so clearly from the record herein as to preclude any need for further discussion of appellants' contentions with reference thereto." (Emphasis added).
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> *McGarry's, Inc. v. Rose*, 344 F. 2d 416, 418.

The courts have preserved the right to a hearing on the merits in subpoena enforcement actions even where an emergency situation existed and the statute in question explicitly provided for district court enforcement of an extremely summary nature. Here, where no emergency has been demonstrated and the

relevant statute does not provide for a special procedure, the Federal Rules have been ignored rather than truncated and Harvey Aluminum has been denied any opportunity to present and to have a hearing on its defenses to the subpoena enforcement. It is submitted that the *ex parte* Order secured by the Board is invalid and that Harvey Aluminum has been denied Due Process of Law.

Conclusion.

It is respectfully submitted that the decision of the District Court for the Central District of California enforcing the *subpoena duces tecum* of the Board against Harvey Aluminum be reversed and that the Order issued pursuant to said decision be vacated and set aside.

Dated: October 6, 1967.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM F. SPALDING